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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

versus

VERMILION CORPORATION,
Respondent

AMICUS CURIAE BRIEF FOR RAMOS INVESTMENT CO.

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AMICUS BRIEF FOR RAMOS INVESTMENT CO.

I.

OPINIONS BELOW

The opinion of the Court of Appeal for the Third Circuit of the State of Louisiana is reported at 356 So.2d 551 (La. App. 3rd Cir. 1978), *writ denied,* 357 So.2d 558 (La. 1978).

II.

INTEREST OF AMICUS CURIAE

Ramos Investment Company is a Louisiana partnership which owns and maintains extensive land property in the Atchafalaya Basin in south-central Louisiana. Numerous private waterways similar to those in question in these proceedings are situated on this property. Many of these waterways, including artificial canals, were constructed to provide access for mineral and timber operations, and for drainage,

irrigation, reclamation and recreational activities. They were constructed with private funds and are used only with the permission and authorization of the landowner. As such waterways have historically been treated under Louisiana law as the private property of the individual landowners on whose property they are located, subject to use under such landowner's exclusive regulation, it seems clear that the partnership's holdings will be directly affected by the decision of this Honorable Court on the issue of unrestricted public access to and use of such waterways.

While an adverse ruling by this Court on this issue will act to deprive Ramos Investment Company of some part of the value of their property rights under Louisiana law, it will also present certain questions involving the burden of maintaining and policing the waterways. Although these controversies are not before the Court at this time, the possibility that such issues will be generated by this Court's treatment of the present controversy is also of concern to the partnership.

III.

INVOLVED PROVISIONS OF LAW

(1) U.S. Const. art. 1, §8, cl.3:

"The Congress shall have power to regulate Commerce with Foreign Nations, and among the several states. . . ."

(2) U.S. Const. amend. V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(3) U. S. Const. amend. X:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(4) 33 U.S.C. 403, which reads, in part, as follows:

"The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited . . . ."

(5) The Louisiana Organic Act, 2 Stat. 703, which reads, in part, as follows:

"[i]t shall be taken as a condition upon which the said state is incorporated into the Union, that the Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and [forever] free, as well to the inhabitants of the said state as to inhabitants of other states. . . ."

IV.

QUESTIONS FOR REVIEW

(1) If a private citizen on its privately held real property and with its private funds creates a system of artificial navi-

gable waterways, in part via diversion, of a natural navigable waterway which flowed through that property, does the artificially developed waterway system, which is connected to other interstate navigable waters and to the seas, thereby become part of the "navigable waters of the United States," subject to a "navigation servitude" in favor of all citizens of the United States?

(2) Are channels built on private property and with private funds, which thereby are made to join with admitted and preexisting tidal and other navigable waterways, and which are themselves navigable in fact and tidal, "navigable waters of the United States", burdened with "navigation servitude" in favor of public?

V.

ARGUMENT

A. *Under Louisiana law, artificially created waterways, built on private land with private funds for private use, are private property not subject to a public navigation servitude.*

Article 450 of the Louisiana Civil Code provides, in part, that: "public things that belong to the State are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore." Comment (f) to Article 450 illustrates that the phrase "natural navigable water bodies" refers to waters, the bottoms of which belong to the State either by virtue of its inherent sovereignty or by virtue of other modes of acquisition." Artificially created canals on private property for private use are private things just as a private road on private property created for private use is also a private thing. *(See Vermilion Corp. v. Vaughn,* 356 So.2d 551 (La. App. 3rd Cir. 1978); *writ denied,* 357 So.2d 558 (La. 1978) *cert. granted* 99 S.Ct. 1211 (1979); *National Audubon Society v. White,* 302 So.2d 660 (La. App. 3rd Cir. 1974), *writ denied,* 305 So. 2d 542 (La. 1975); *Ilhenny v. Broussard,* 172 La. 895, 135 So. 669 (1931)). The Louisiana Third Circuit Court of Appeals in its opinion in these proceedings found *Ilhenny v. Broussard* controlling. Thus, in Louisiana the law permits private ownership of artificially created canals on private property.

1. *The authority to create and regulate rights to property within their boundaries is reserved to the several states.*

Under the Equal Footing Doctrine, states admitted after the initial formation of the Union are accorded the same rights, sovereignty and jurisdiction as the original states. (*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Coyle v. Smith,* 221 U.S. 559 (1911); *Draper v. United States,* 164 U.S. 240 (1896). Among these rights is the authority to create and regulate property rights, in particular, property rights in navigable waterways, their banks and their bottoms. *United States v. Kaiser-Aetna,* 408 F.Supp. 42 (1976), *cert. granted* 99 S. Ct. 1211 (1979); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Northern Transportation Co. v. Chicago,* 99 U.S. 635 (1879); *North Shore Boom and Driving Co. v. Nicomen Boom Co.*, 212 U.S. 406 (1909); *Wisconsin v. Duluth,* 96 U.S. 379 (1877). Louisiana's creation of private property rights in artificially created canals on private property is a valid exercise of the State's power to create and regulate rights in property within their boundaries.

Implicit in a state's sovereignty is the power to regulate its internal affairs by such laws as it deems wise. This is an in-

herent power, retained by the states and not surrendered to the federal government. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Federal law will not supersede a proper exercise of the state's power over property within its boundaries unless the act in question directly conflicts with an act of Congress passed pursuant to power granted by the United States Constitution. *Cohen v. Bredehoeft*, 290 F.Supp. 1001, *aff'd* 402 F.2d 61 (D.C. Tex. 1968), *cert. denied* 393 U.S. 1086 (1969). The court in *Cohen* went on to hold that the Commerce Clause (U.S. Const. article I, section 8, clause 3), by itself, does not preclude states from regulating matters of the health, life and safety of their citizens even though such legislation might indirectly affect an area over which concurrent federal jurisdiction to regulate is established by the Constitution.

2. *Treatment of private artificial canals by the State of Louisiana as if such canals were real property is a proper means of managing problems peculiar to the geography of the area.*

Article 450 of the Louisiana Civil Code is a recognition by a sovereign state that property rights in artificial private canals originally vested in real property prior to the construction of the canals. Logically, the Louisiana legislature has treated these rights consistently with the history of the property so as not to deprive the owners of the value of previously vested rights. As such, Louisiana law is well tailored to encourage property owners to improve their property by digging canals. This incentive is particularly meaningful in Louisiana because of the marshy nature of the property in question, which permits travel only by limited means, principally over water. If improving property by digging a canal results in devaluation or loss of a property right, development of resources by private interests will be discouraged.

This may impede the interests of commerce far more than the injunction before the Court.

3. *Destruction or devaluation of state granted property rights through creation and exercise of public navigation servitude requires express congressional authorization.*

. . . . .

Article 450 and its judicial construction recognize the private property rights granted in banks and bottoms of artificial waterways as well as rights equivalent to usufructs relating to the use of the water during its flow across private lands. Significantly, it is well established by federal law that the shores of navigable waters and the soil under them were not granted to the United States by the Constitution but were reserved to the several states. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 221 (1845); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 756 (1867); *Shively v. Bowlby*, 152 U.S. 1 (1893); *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U.S. 347 (1893); *Appleby v. New York*, 271 U.S. 364 (1926). Although *Pollard's Lessee v. Hagen* was modified in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), by a holding that the state's title to the banks and bottoms of navigable waterways is held in trust for public use, nevertheless, the state maintains authority to determine what treatment of the property is most beneficial to the public at large.

In *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249-52 (1954), this Court recognized a state granted usufructary right to the use of waters of a navigable stream of the United States for the generation of power. The Court held that the state's grant was subject to a dominant servitude in favor of the United States, but recognized that clear congressional authorization was an absolute

pre-requisite to exercise of that servitude when no allowance has been made for preexisting rights under state law. The ultimate result in *Niagara Mohawk* rested on the finding that the Federal Water Power Act of 1920 did not express clear congressional intent to abolish state granted property rights over navigable water. There, the legislation did not authorize exercise of the federal government's dominant servitude.

In the present controversy, the State of Louisiana has granted proprietary rights in accordance with the rights of sovereignty possessed by it since its entry into the Union. The granting of such rights has been upheld consistently, with respect to the banks and bottoms of navigable waters as well as to the flow therein. Where congressional intent to abrogate state granted property rights is ambiguous, federal legislation should be interpreted to give effect to the rights granted by the state. *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). *See also, Volkswagen de Puerto Rico v. Labor Relations Board of Puerto Rico*, 331 F.Supp. 1043, *aff'd* 454 F.2d 38 (D.C. Puerto Rico 1970). In fact, it has been held that until the United States assumes control over an aspect of an instrumentality of interstate commerce, the state involved will retain its authority thereover. *In re Silver Bridge Disaster litigation*, 381 F.Supp. 931 (S.D.W. Va. 1974).

4. *Incidental shifting of a water course, in the geographic context of fragile, ever changing Louisiana wetlands, is not a realistic basis for recognizing a public navigation servitude where none had existed before.*

Petitioners assert that Respondent's artificial private waterways were created, at least in part, through diversion of the waters of a navigable stream which had once been used in commercial navigation. While there was no proof of this

assertion in the record below, it is submitted that had such diversion occurred, it would be insufficient in itself to justify the recognition of a public navigation servitude on Respondent's waterways. In *Leovy v. United States*, 177 U.S. 621 (1900), this Court considered the navigable status of waterways created by the diversion of waters of the Mississippi River through a small crevasse which had been used for navigation in interstate commerce by various small luggers and yawls, and which was clearly navigable in fact. The Court there held that the waterway was not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act of September 19, 1890. Thus, the Court refused to recognize a navigation servitude in that waterway; a waterway which had actually been used in public commercial navigation and which was created through diversion of a far more substantial waterway than any involved in the present dispute.

It is essential that the Court consider the unique geophysical nature of Louisiana's marshland. Constant shifting of the soil and waters is characteristic of these wetlands and has caused charting of the region's watercourses to remain substantially incomplete. If the rights to property are held to change with every shift in the flow of waters to the Gulf, the regulation of property rights by Louisiana will become a hopelessly complex task, with the result that property owners will never be quite certain of what rights they possess.

Further, absent proper records illustrating the continuing evolution of this watery region, factual determination of the extent to which these waterways owe their genesis to other navigable waters though diversion would seem near impossible. To encourage alteration of state granted rights on the basis of such hazy factual evaluations would not be wise.

B. *Artificial canals are not "navigable waters of the United States" and are not subject to public navigation servitude without express congressional authorization.*

1. *The canals are not "navigable waters of the United States" because they were not navigable in their ordinary and natural condition.*

Generally, it has been held that all waters are navigable waters of the United States where they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). *See also, The Montello*, 87 U.S. (20 Wall.) 430 (1874); *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Leovy v. United States*, 177 U.S. 621 (1900). While it has been stipulated that the waters in question are navigable in fact, Respondents did not show that they were, in their natural and ordinary condition, susceptible to use as part of a continued highway of interstate commerce. To the contrary, the canals were not susceptible for use in interstate commerce in their natural and ordinary condition. They possessed neither the volume of water, the gradients nor the regularity of flow necessary for navigation. It was only by the expenditure of extraordinary effort that these waterways came into existence such as permits their use in commerce at all. (For discussion of the phrase "natural and ordinary condition" as it relates to navigable waters of the United States, *see United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), *rehearing denied* 312 U.S. 712 (1941).

2. *Even if Respondent's canals are deemed "navigable waters of the United States" no public navigation servitude may be exercised without congressional authorization.*

The exercise of a navigation servitude by the federal government as an attribute of its dominant servitude over "navigable waters of the United States" requires clear authorization by Congress for the reasons set forth in part A(3) of this brief.

C. *The Rivers and Harbors Act (33 U.S.C. § 403) is not applicable to injunctions issued under state law to protect property rights in private artificial waterways.*

1. *Privately owned, artificial waterways are not "navigable waters of the United States" such as are contemplated by the statute.*

Louisiana law making artificial canals built on private property with private funds subject to private ownership does not conflict with the Rivers and Harbors Act (33 U.S.C. § 403). Although section 403 does prohibit the creation of any unauthorized obstruction to the navigable capacity of any of the waters of the United States, whether the phrase "navigable waters of the United States" was intended to apply to Louisiana's private artificial canals is a question which has yet to be resolved. It has been held that all waters are navigable waters of the United States where they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). *See also, The Montello*, 87 U.S. (20 Wall.) 430 (1874). *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Leovy v. United States*, 177 U.S. 621 (1900). While it has been stipulated that the waterways in question are navigable in fact, they were not susceptible for use as part of a highway of interstate commerce. See part B(1) of this brief.

2. *Injunctions issued under state law to protect property rights in private artificial waterways are not "obstacles" as are contemplated by the statute.*

While it may be argued that the purpose of the Rivers and Harbors Act is to keep open for interstate commerce all navigable waters within the United States such as are susceptible to that use, a close tracking of the statute fails to reveal this intent. More precisely, the statute is intended to maintain those natural navigable waterways of the United States susceptible for use in interstate commerce free of physical obstruction such as would impede that commerce. This purpose does not require the abrogation of property rights granted under Louisiana law in that it neither contemplates nor requires application of the statute to artificially created canals. Additionally, application of the statute to Louisiana's artificial waterways would necessarily deprive owners of property rights acquired under state law. In so doing, it may be expected to remove the incentive created under Louisiana law for private owners of wetlands to create navigable waterways and thereby ultimately have the result of retarding the development of the nation's system of navigable highways.

Petitioners have invoked the federal prohibition against unauthorized obstructions on navigable waterways of the United States on the theory that an injunction issued to protect state granted property rights is an obstruction such as is contemplated by the act. Having set forth the terms of its prohibition generally, the statute lists obstructions which are not permitted. Thus, it states, "it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States" (33 U.S.C. § 403). While this list serves merely to illustrate what manner of obstruction the

statute seeks to prescribe, it is clear from first reading that the drafters restricted themselves to physical obstacles. No cases have applied this statute to "legal obstructions" like that in the instant controversy. Furthermore, it seems unlikely that the drafters of this section intended to prohibit the use of injunctions by all courts with respect to navigable waterways. Such a broad reading of the statute would have the effect of invalidating all injunctions issued to protect private property rights in navigable waterways whether those rights were granted by state or federal authorities.

3. *Judicial expansion of the terms of the statute is an improper means of creating a navigation servitude over artificial waterways.*

Even if the private waterways in question are found to be navigable waters of the United States, and as such within the regulatory authority of the federal government, this does not of itself create a public navigation servitude. The mere existence of latent federal regulatory power does not mean that a public navigation servitude is thereby created. Such a servitude has never been applied to fast lands or nonnavigable waters without express determination by Congress. *United States v. Cress*, 343 U.S. 316, 325-26 (1917). *Cf., United States v. Grand River Dam Authority*, 363 U.S. 229, 232-33 (1960). The purpose and justification of public navigation servitude has long been recognized as stemming from the need to preserve waterways for present or future commercial needs. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-91 (1945); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921); *Gibson v. United States*, 166 U.S. 269, 276 (1897).

Thus, navigation servitude over navigable waters may limit private rights to the underlying soil and to uses of the waters because of the paramount public interests rights which the servitude protects. It must be noted however that no such public interest has been recognized in nonnavigable streams. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 67-70 (1913). The Court there established that public interest in waterways such as gives rise to navigation servitude is based implicitly upon the existence of a reasonable expectation that such waterways are susceptible to use in commerce. In their original condition Respondent's artificial canals were not susceptible to use for commerce. No reasonable expectation existed that they could be made susceptible to commerce by reasonable improvements. In the absence of such expectation, it should not be concluded that the public has a right to use these waterways as improved without compensation to their owners. This analysis is reinforced by *United States v. Cress*, 243 U.S. 316, 326 (1917), where the Court held that improved navigable rivers do not change their status as navigable rivers because of the improvements. In an opinion by the U.S. Attorney General (36 Op. U.S. Att'y. Gen. 203, 214 (1930), it was recognized that wholly artificial portions of improved navigable streams which, like nonnavigable streams, having never been subject to a navigation servitude could not be appropriated without compensation. It was there stated that, "although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owners, and deprive the latter of any investment upon it."

Although the Supreme Court has not addressed this question directly, it opinion in *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), seems near enough to provide guidance. The Court there upheld an exclusive license granted to private interests allowing them to navigate a stretch of improved waterway over a period of twenty years. The license had been granted in the form of compensation for authorized improvements undertaken by private parties. The Court there distinguished *Gibbons v. Ogden*, finding that the authority exercised in that case did not include the privilege of use of canals made available for navigation by state funds or by privileges that the state had conferred for the accomplishment of that end. It is difficult, perhaps impossible, to conceive of a convincing rationale by which Louisiana may be prohibited from granting private ownership and exclusive navigational use of artificial canals as an incentive for the building of such canals on private land, in the face of the apparent validity of the action of the State of Maine in granting exclusive navigational rights over a waterway improved by private parties.

Although it has been alleged that the waterways in question were created by the diversion of a natural waterway over which interstate commerce had in the past been conducted, it is clear from the holding in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), that the effect on property rights caused by the change in course of a waterway is a matter to be determined under state law and not by the application of federal common law. Even if Petitioners' allegations could be proved, the result under the laws of Louisiana would be unchanged. (*Vaughn v. Vermilion Corporation*, 356 So.2d 551 (La. App. 3rd Cir. 1978), *writ denied* 357 So.2d 558 (La. 1978), *cert. granted* 99 S.Ct. 1211 (1979)).

a. *Creation of a navigation servitude where none had existed deprives the owner of use of the property and is a*

"taking" within the Fifth Amendment of the United States Constitution.

No common law doctrine exists creating a public navigation servitude which is applicable specifically to privately owned artificial waterways. The attempt to apply the doctrine used in *Gibbons v. Ogden* is clearly intended to extend public navigation to waterways on which it has not previously existed. In the event Petitioners' succeed in their effort to so extend navigational servitude to the artificial canals in question, the effect will be to deprive Respondents of the incidents and attributes of vested property rights. Such an extension of this doctrine would constitute a taking and, as there has been no provision authorizing adequate compensation for that taking, would violate the Fifth Amendment of the United States Constitution.

In the past, no public navigation servitude has existed with respect to Respondent's artificially created canals under either the federal or state law.In the absence of an overriding servitude, Louisiana has vested property rights, including exclusive navigational use of the waterways involved, in individuals. These rights vest only in owners of artificially created canals built with private funds on private property and maintained exclusively for private uses. Since the creation of these property rights does not conflict with any previously existing navigation servitude, they should be held valid. Further, in that such rights have been permitted to vest, deprivation of any part of the rights, *i.e.* the right to exclusive navigational use within the boundaries of the private property involved, is a taking as is contemplated by the Fifth Amendment. Insofar as there is no provision for compensation for this taking, it must be held that the creation of public navigation servitude with respect to these properties would be unconstitutional.

While it may be asserted that the creation of a servitude on a waterway is not a "taking" of property such as warrants compensation under the Fifth Amendment, the authority to the contrary is clear. *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Dickerson*, 331 U.S. 745 (1947); *United States v. Causby*, 328 U.S. 256 (1956); *Chicago R.I. & P.R. Co. v. United States*, 284 U.S. 80 (1931). A persuasive analogy may be drawn between the facts in the present dispute and those in *United States v. Causby*, in which it was held that where the exercise of a federal dominant servitude deprives a property owner of the use of his property, the deprivation constitutes a "taking" within the meaning of the Fifth Amendment. In *Causby*, the government had exercised an existing servitude over airspace for navigation with the result that an owner of land below was unable to use his property as intended. The Court in *Causby* held that compensation was required by the Fifth Amendment even though the owner was only deprived of the use of his property. Despite the fact that the taking in *Causby* resulted from the exercise of a federal dominant servitude over airspace, the rationale as it relates to the Fifth Amendment remains applicable.

Simply because the federal government's right to exercise a dominant servitude is limited by the prohibition against uncompensated takings of the Fifth Amendment does not mean that the federal government is without power to create such a servitude. Congress could have expressly authorized the creation of such a servitude or otherwise invalidate the property rights here involved by means of a statute providing adequate compensation for the property which is to be taken. *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). But Congress has not done so.

b. *Where the creation and exercise of a dominant servitude by the federal government deprives an owner of vested property rights such a "taking" must be compensated under the Fifth Amendment.*

In *Monogahela Navigation Co. v. United States*, 148 U.S. 312 (1893), the private right to control access to navigation on a waterway via a system of locks was taken by condemnation. The Court required the Government to pay for the taking of rights as well as for tangible personal property included in the condemnation. The Court explicitly recognized that Congressional power to regulate commerce was limited by the Fifth Amendment's just compensation clause, *id.* at 336. While it may be argued that the federal government is not required to compensate for takings involving navigable waterways, supporting jurisprudence is distinguishable from the present case in that in those cases either no vested right had been recognized or the taking was incidental to the completion of an expressly authorized government project. *See United States v. Rands*, 389 U.S. 112, 125-26 (1967); *United States v. Virginia Electric & Power Co.*, 365 U.S. 222, 228 (1956); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 62, 68-69 (1913); *United States v. Lynah*, 188 U.S. 445, 470 (1903); *Scranton v. Wheeler*, 179 U.S. 141, 164-65 (1900); *Gibson v. United States*, 161 U.S. 269, 275-76 (1897).

The estoppel rationale of *The Monogahela* is applicable here. Respondents and their lessees have created navigable canals where none existed before. Even if one accepts Petitioner's assertions that Respondent's canals were created in part through diversion of other natural waterways, the clear import of the facts cannot be denied. Respondent's have relied heavily, to their detriment, upon the existence of incidents and attributes of private property rights created by

Louisiana law in private artificial canals. Furthermore, canals created since 1970 have all been authorized by the Army Corps of Engineers. It would hardly be equitable for Respondents to be deprived of the benefits of their effort and investment after having relied both on the law of Louisiana and the good faith of the federal government in approving their construction projects.

Respondents have also relied on the fact that the federal government has not taken upon itself the maintenance or improvement of these waterways, as would be appropriate where waterways were deemed to be subject to a public navigation servitude. The duty to maintain a waterway subject to public navigation servitude is clearly a burden such as was contemplated by the Court in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) when it stated that the Fifth Amendment "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

D. *Absent legislation showing congressional intent to create a public servitude, the Commerce Clause power does not warrant federal interference with state regulation of property.*

Although it has been held that the Commerce Clause may act as a limitation upon state power even without congressional implementation *(Exxon Corp. v. Governor of Maryland*, 98 S.Ct. 2207 (1978); *Great Atlantic & Pacific Tea Co, Inc. v. Cottrell*, 424 U.S. 366 (1976)), it is equally clear that not every exercise of state authority which imposes some burden on the free flow of interstate commerce is therefore invalid. (*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)). These seeming-

ly divergent propositions of law have routinely presented the court with the task of balancing the interests of the state in regulating a matter of legitimate local interest against the interests of the federal government in protecting interstate commerce. The interest of the several states in regulating matters concerning property and the rights of individuals has long been accepted as beyond dispute. *See Choctaw and Chickasaw National v. Board of County Commissioners of Love County*, 239 F.Supp. 650 (E.D. Okl. 1965); *Mashunkashey v. Mashunkashey*, 134 P.2d 976 (1942); *Frew v. Bowers*, 12 F.2d 625 (2nd Cir. 1926).

While the power to regulate matters relating to property rights is doubtless one of those powers reserved to the states by the Tenth Amendment of the U.S. Constitution (*United States v. Oregon*, 295 U.S. 1, 14 (1935), *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)), it is also clear that neither the reservation of a power to a state under the Tenth Amendment nor recognition of its sovereign authority to regulate requires that state law govern where it stands in conflict with an overriding principle of federal law, *id.* The Constitution's reservation of powers under the Tenth Amendment has been termed "but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 10, 123-24, (1941). It is respectfully submitted that it is more, as this court recognized in *National League of Cities v. Usery*, 96 S.Ct. 1465 (1976). In *Usery*, the Court invalidated an Act of Congress as exceeding the commerce power (*See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)), in finding that as the 1974 Amendments to the Fair Labor Standards Act of 1938 operated to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [Article] I, [Section] 8, [Clause] 3" (96 S.Ct. at

2474). The Court thereby recognized that the powers reserved to the several states to control matters of local interest need not be overwhelmed by the weight of the commerce power even as implemented by explicit act of Congress.

In the present controversy, Petitioner seeks to defeat the established law of Louisiana, exercised to regulate an area of local interest, through the invocation of an unusual melange of ill-defined "federal common law" and dormant Commerce Clause power. Petitioners assert that the federal government's interest in maintaining Respondent's artificial canals for public use is substantial. This assertion is without basis in the facts. Prior to the extraordinary measures taken by Respondents and their lessees to develop the artificial waterway system, no reasonable expectation existed as to a public right to use those waterways for navigation. At no time since the creation of these canals have they been open to the public for use. Thus, no reasonable expectation could have arisen. Louisiana, on the other hand, maintains a compelling interest in regulating of the management of real property within its borders. It has no way discriminated against interstate commerce in its regulation of these matters. The burden which its laws are purported to have created upon interstate commerce is incidental to its proper management of local interest and has in no way deprived either the federal government or its citizens of property in which they have a vested interest.

CONCLUSION

In its balancing of the interests involved in this dispute, the Court must consider not only interstate commerce and the sovereign rights of states under the Tenth Amendment, but also the need to provide equitable treatment to persons

holding vested property rights. Respondents and their lessees, who have invested extraordinary time, effort and money in the development of an artificial waterway system on their own real property, should not be deprived of a reasonably expected return on their investments. Creation of a public navigation servitude would not only deprive Respondents of legally acquired rights under the laws of Louisiana but also impede the commercial endeavors for which the canals were built.

In light of the interests of a properly balanced federal system as contemplated by the Tenth Amendment and the interests of that federal system in providing to its citizens due process of law with respect to vested property rights, the opinion of the Louisiana Third Circuit Court of Appeal should be affirmed. In the absence of an applicable statute expressing the intent of Congress that artificially created waterways be subject to a public navigation servitude, a dormant commerce clause should not invalidate property rights granted under state law, particularly, when the effect of that state law on interstate commerce is both speculative and incidental.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 17th day of July, 1979 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed and first class postage prepaid.

HARRY S. HARDIN, III